

**"I Won't Participate in an Illegal War":  
Military Objectors, the Nuremberg Defense, and the Obligation to Refuse Illegal Orders**

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## I. Introduction

When Army First Lieutenant (1LT) Ehren Watada refused to deploy to Iraq in 2006, he became the first U.S. Army officer of Operation Iraqi Freedom to disobey deployment orders.<sup>1</sup> First Lieutenant Watada believed the war in Iraq was illegal, and he declared it was “the duty, the obligation of every soldier, and specifically the officers, to evaluate the legality, the truth behind every order—including the order to go to war.”<sup>2</sup> First Lieutenant Watada claimed he had personally researched the legal issues surrounding the war and had come to the conclusion the war was illegal,<sup>3</sup> and he insisted that “[t]he wholesale slaughter and mistreatment of the Iraqi people with only limited accountability is not only a terrible moral injustice, but a contradiction to the Army’s own Law of Land Warfare.” He further stated that his “participation would make [him] a party to war crimes.”<sup>4</sup>

First Lieutenant Watada became a minor *cause célèbre* within the American antiwar movement<sup>5</sup> primarily because of his rank as an officer,<sup>6</sup> but he was not the only servicemember to refuse orders to deploy to Iraq. At a congressional hearing in 2007, Sergeant Matthis Chiroux of the U.S. Army Individual Ready Reserve (IRR), who had

received orders recalling him to active service, publicly declared his intention to disobey his recall orders, calling the war an “illegal and unconstitutional occupation.”<sup>7</sup> Jeremy Hinzman, the first of several American deserters to attempt to avoid service in Iraq by seeking refuge in Canada, claimed his participation in the war would make him “a criminal.”<sup>8</sup>

Often citing the International Military Tribunal (IMT) at Nuremberg as justification to refuse orders to fight, saying that soldiers bear responsibility for “crimes against the peace” and “wars of aggression,”<sup>9</sup> and invoking the well-established duty of soldiers to refuse to follow illegal orders, these soldiers and others like them have claimed they could not, in good conscience, participate in the Iraq war.<sup>10</sup> They faced administrative and judicial punishment for refusing to obey orders.

This article examines whether soldiers have a defense when they refuse to participate in a war they believe is illegal and, consequently, claim an order to deploy is an illegal order. Part II of this article outlines the legal responsibilities of soldiers regarding illegal orders and discusses the difficulty of defining an illegal war under domestic law. Despite much litigation, the federal judiciary has rarely addressed the question of a war’s legality, and when it has, it has consistently found the war in question to be legal. This article then examines whether, absent a determination that a war is illegal, a defense is still available under military law against a charge of desertion, dereliction of duty, missing movement, or failure to follow an order.<sup>11</sup> Part III considers the responsibility for illegal war under international law, including the precedents set in the 1940s at Nuremberg. This part also examines the philosophical distinctions between *jus ad bellum* (justice of war) and *jus in bello* (justice in war) and whether military personnel can be considered war criminals for their participation in an illegal war. Part IV addresses the significance of these issues and

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<sup>1</sup> Hal Bernton, *Officer at Fort Lewis Calls Iraq War Illegal, Refuses Order to Go*, SEATTLE TIMES, June 7, 2006, available at [http://seattletimes.nwsource.com/html/localnews/2003044627\\_nogo7m.html](http://seattletimes.nwsource.com/html/localnews/2003044627_nogo7m.html). The “Iraq war” hereinafter refers to the ongoing military operations of U.S. and allied military personnel in Iraq formally titled Operation Iraqi Freedom, which began in 2003.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Megan Greenwell, *Student Protestors, Fighting Image of Apathy, Call for a Cohesive Movement*, WASH. POST, Jan. 28, 2007, at A08. Despite the description as a single entity, the “American antiwar movement” is not a monolithic organization; rather, it is a loose assortment of various groups and societies, each generally opposed to the U.S.-led invasion and occupation of Iraq.

<sup>6</sup> Since 2003, 1LT Watada is the only officer to refuse deployment orders on legal grounds; however, there have been officers who have applied for and obtained conscientious objector status. See, e.g., *West Point Grad Wins Objector Status*, ASSOCIATED PRESS, Oct. 16, 2007 (describing how Army Captain Peter Brown successfully obtained conscientious objector status).

<sup>7</sup> US Soldier Refuses to Serve in ‘Illegal Iraq War,’ AGENCIE FRANCE-PRESSE, May 16, 2008, available at <http://afp.google.com/article/ALeqM5inlEUuu-qX05oAPENqq3Yi51FvZg>.

<sup>8</sup> Tracy Tyler, *U.S. Deserter Fears for His Life*, TORONTO STAR, July 8, 2004, at A02.

<sup>9</sup> Jeremy Brecher & Brendan Smith, *Will the Watada Mistrial Spark an End to the War?*, NATION, Feb. 9, 2007, available at <http://www.thenation.com/article/will-watada-mistrial-spark-end-war>.

<sup>10</sup> U.S. DEP’T OF ARMY, FIELD MANUAL 6-22, ARMY LEADERSHIP ¶ 4-74 (12 Oct. 2006) [hereinafter FM 6-22] (“Under normal circumstances, a leader executes a superior leader’s decision with energy and enthusiasm. The only exception would be illegal orders, which a leader has a duty to disobey.”).

<sup>11</sup> See UCMJ arts. 85, 87, 92 (2008).

the danger to national security that would result from allowing soldiers to choose which wars to fight.

This article focuses on a specific group of soldiers,<sup>12</sup> for these purposes labeled “military objectors.” They desert, disobey orders, or otherwise violate the Uniform Code of Military Justice (UCMJ) by refusing to participate in a war or a military operation because they believe the particular war is illegal. When faced with criminal charges or administrative action, they offer the defense that an order to deploy to an illegal war is per se an illegal order.

Military objectors as defined here differ from conscientious objectors, who oppose all wars on moral grounds.<sup>13</sup> Some objectors mentioned in this article claim to have witnessed or participated in specific violations of the laws of warfare; this article does not address the validity of their claims or the responsibility such soldiers and their leaders would bear for those crimes, if true. Though it is almost certain that some objectors may be motivated by political ideology, a desire for publicity, or fear of combat, it is also likely that there are some whose professed beliefs are genuine. This article illustrates that even genuine military objectors, who may be otherwise honorable and loyal soldiers yet feel they cannot in good conscience participate in a particular war, have no defense in the military justice system.

## II. The Legality of War Under Domestic Law

Perhaps the most common criticism of modern wars is that they are “undeclared” wars.<sup>14</sup> The U.S. Constitution gives Congress the power to declare war,<sup>15</sup> yet only five conflicts in American history have been declared wars.<sup>16</sup>

<sup>12</sup> For the sake of simplicity, this article uses examples, references, and professional terms from the U.S. Army (*e.g.* “Soldiers”), but the legal principles are applicable to all American military personnel.

<sup>13</sup> U.S. DEP’T OF ARMY, REG. 600-43, CONSCIENTIOUS OBJECTION, glossary (21 Aug. 2006) (defining conscientious objection as “a firm, fixed, and sincere objection to participation in war *in any form* or the bearing of arms because of religious training and belief).

<sup>14</sup> See, *e.g.*, *With Regards to War, Is Congress Relevant?*, 148 CONG. REC. H7009 (daily ed. Oct. 3, 2002) (statement of Rep. Paul); KENNETH B. MOSS, UNDECLARED WAR AND THE FUTURE OF U.S. FOREIGN POLICY (2008); *Undeclared War and the Destruction of the Constitution*, Tenth Amendment Ctr., <http://www.tenthendmentcenter.com/2007/06/17/undeclared-war-and-the-destruction-of-the-constitution> (June 17, 2007).

<sup>15</sup> See U.S. CONST, art. I, § 8, cl. 11.

<sup>16</sup> See 23 Annals of Cong. 298 (1812) (Declaration of War against Great Britain in 1812), available at <http://memory.loc.gov/ammem/amlaw/lwac.html> (using Browse or Search function); An Act providing for the Prosecution of the existing War between the United States and the Republic of Mexico, 9 Stat. 9 (1846). An Act Declaring that War Exists Between the United States and Spain, 30 Stat. 364 (1898), Joint Resolution Declaring that a State of War Exists Between the Imperial German Government and the Government and the People of the United States and Making Provision to Prosecute the Same, 40 Stat. 1 (1917) (first declaration of war by the United States in World War I); Joint Resolution Declaring that a State of

Presidents, however, have ordered military forces onto foreign soil for several purposes, including active combat.<sup>17</sup> As this section explains, today it is understood, if not always accepted, that the commitment of military forces to operations, including ground combat, does not require a congressional declaration of war to be legal. Determining a war to be illegal, therefore, has become nearly impossible. If a war is legal, an order given by competent authority to participate in the war is definitely a legal order.

### A. The Illegality of an Order as a Defense Under Military Law

Military law requires soldiers to follow all lawful orders issued by their superiors and provides for criminal punishments for failure to do so.<sup>18</sup> All orders carry a presumption of legality, even illegal orders.<sup>19</sup> Under military law, the only defense for failing to follow an order is that “the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful.”<sup>20</sup> Though the refusal to follow an illegal order is sometimes called the “Nuremberg defense,” it is not actually a defense in the legal sense. The legality of an order is not an element of the offense to be proven by the prosecution (or rebutted by the defense); it is a preliminary question of law to be determined by the military judge.<sup>21</sup>

### B. War Powers and the Federal Judiciary

Congress has not affirmatively declared war since 1942.<sup>22</sup> However, in the last seven decades, nearly every

War Exists Between the Imperial Government of Japan and the Government and the People of the United States and Making Provision to Prosecute the Same, 55 Stat. 795 (1941) (first declaration of war by the United States in World War II).

<sup>17</sup> MAX BOOT, THE SAVAGE WARS OF PEACE: SMALL WARS AND THE RISE OF AMERICAN POWER (2002) (providing historical accounts of dozens of military operations on foreign territory throughout American history, including President Jefferson’s “Barbary Wars” beginning in 1801, the “Philippine War” of 1899–1902, the expedition against Pancho Villa in 1916, President Wilson’s intervention against the Bolsheviks in Russia in 1918, and the long and complicated history of U.S. military involvement in China).

<sup>18</sup> See UCMJ art. 92 (2008).

<sup>19</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 14(c)(2)(a) (2008) [hereinafter MCM].

<sup>20</sup> *Id.* R.C.M. 916(d). As a corollary, a servicemember who knows or has reason to know that an order is illegal would lose this defense and be held liable for his actions, thus the law implies an obligation to refuse illegal orders.

<sup>21</sup> *United States v. New*, 55 M.J. 95, 105 (C.A.A.F. 2001); see also MCM, *supra* note 19, R.C.M. 801(e).

<sup>22</sup> Joint Resolution Declaring that a State of War Exists Between the Government of Rumania and the Government and the People of the United States and Making Provisions to Prosecute the Same, Pub. L. No. 77-563, 56 Stat. 307 (1942).

President has committed military forces to continuous operations on foreign soil involving direct combat against a hostile force.<sup>23</sup> None of these military commitments was a war explicitly declared by Congress, nor were the commitments deviations from historical practice.<sup>24</sup> Nevertheless, the legality of these actions, when challenged, has been uniformly upheld.

In 1964, Congress authorized an escalation of the Vietnam War, but by 1973 Congress was determined to curtail the President's ability to make war unilaterally.<sup>25</sup> Congress's action led to the passage of the War Powers Act.<sup>26</sup> Controversial from its inception, the War Powers Act was passed into law over President Nixon's veto.<sup>27</sup> Every president since has considered the War Powers Act unconstitutional.<sup>28</sup> In particular, 50 U.S.C. § 1544, which requires the President to remove military forces from a theater of operations upon a concurrent resolution of Congress, has been called into question in light of several Supreme Court decisions invalidating so-called "legislative vetoes."<sup>29</sup>

Despite the challenges to its constitutionality, the War Powers Act has been invoked to authorize military action in Lebanon, Kuwait, Iraq (twice), Somalia, and Afghanistan, and also to limit the involvement of military forces in Haiti and Iraq.<sup>30</sup> During the same period, military actions in Iran,

Honduras, Grenada, Libya, and Panama were undertaken without any prior congressional authorization.<sup>31</sup> In all cases, the federal judiciary has consistently avoided finding any particular military operation to be an illegal war.

In a case remarkably similar to 1LT Watada's, Army Captain (CPT) Yolanda Huet-Vaughn was convicted of desertion with intent to avoid hazardous duty in violation of Article 85, UCMJ.<sup>32</sup> Her attorney testified that her "intent was not to avoid hazardous duty or important service, but her intent was to expose what she felt were impending war crimes in the Persian Gulf."<sup>33</sup> At her court-martial, CPT Huet-Vaughn testified that, after personal research into the issues surrounding the 1991 Gulf War, she determined that the war was morally objectionable and she had an obligation "as a military person . . . to expose what [she] saw at that point as—as a move to a catastrophic consequence."<sup>34</sup> The Court of Appeals for the Armed Forces (CAAF) upheld the military judge's instruction that "[a]ny belief by the accused that what she might have been required to do could have been in violation of international law is not a defense."<sup>35</sup> The court also noted that, "to the extent that CPT Huet-Vaughn intended to contest the legality of the decision to employ military forces in the Persian Gulf, the evidence was

<sup>23</sup> For example, the Korean War (Truman, Eisenhower), Vietnam War (Kennedy, Johnson, Nixon), Iran Hostage Rescue (Carter), Grenada and Lebanon (Reagan), Panama and the Gulf War (G. H. W. Bush), Somalia, Bosnia, and Kosovo (Clinton), Iraq and Afghanistan (G. W. Bush, Obama) were all significant military deployments on foreign territory, in some cases lasting years.

<sup>24</sup> BOOT, *supra* note 17, at 336–37. Declared wars have always been the rare exception, rather than the rule, to American military involvement abroad. *Id.*

<sup>25</sup> Joint Resolution to Promote the Maintenance of International Peace and Security in Southeast Asia, Pub. L. No. 88-408, 78 Stat. 384 (1964) (commonly called the "Gulf of Tonkin Resolution").

<sup>26</sup> 50 U.S.C. §§ 1541–548 (2006).

<sup>27</sup> Joint Resolution Concerning the War Powers of Congress and the President, Pub. L. No. 93-148, 87 Stat. 555, 559–60 (1973).

<sup>28</sup> James A. Baker III & Warren Christopher, *Put War Powers Back Where They Belong*, N.Y. TIMES, July 8, 2008, at A21; see also GEORGE H.W. BUSH, Statement on Signing the Resolution Authorizing the Use of Military Force Against Iraq, in 1 PUB. PAPERS OF GEORGE BUSH 40 (Jan. 14, 1991) (stating that by signing the resolution, he was not reversing the longstanding position of the executive branch that the War Powers Act is unconstitutional). President Obama's view of the constitutionality of the War Powers Act is unknown.

<sup>29</sup> See generally INS v. Chadha, 462 U.S. 919 (1983) (invalidating so-called "legislative vetoes"). Note that 50 U.S.C. § 1548 provides for severability should any portion of the act be invalidated.

<sup>30</sup> Multinational Force in Lebanon Resolution, Pub. L. No. 98-119, 97 Stat. 805 (1983); Authorization for Use of Military Force Against Iraq, Pub. L. No. 102-1, 105 Stat. 3 (1991); Department of Defense Appropriations Act, 1994, Pub. L. No. 103-139 § 8151, 107 Stat. 1418, 1476, (1993) (approving use of U.S. military forces for certain purposes in Somalia); National Defense Authorization Act of 2000, Pub. L. No. 106-65 § 1232, 113 Stat.

512, 788, (1999) (limiting deployment of U.S. Armed Forces in Haiti); Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (authorizing use of force against "those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons"); Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498; National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163 § 1227, 119 Stat. 3136, 3465–66 (section titled "United States Policy in Iraq," requiring quarterly reports from the President on policy and operations in Iraq).

<sup>31</sup> President Carter reported to Congress in 1980 after the failed hostage rescue attempt in Iran; some members of Congress expressed displeasure but no formal action was taken by Congress as a whole. RICHARD F. GRIMMET, THE WAR POWERS RESOLUTION AFTER THIRTY YEARS 15 (Gerald M. Perkins ed., Novinka Books, 2005). President Reagan reported the deployment of troops to Honduras in 1983 as a training exercise, although some in Congress alleged the deployment was to support the anti-government rebellion. *Id.* at 17–18. President Reagan also reported the 1983 invasion of Grenada to Congress after the troops had landed. The House of Representatives passed a resolution seeking to invoke the limiting provisions of the War Powers Act; the Senate passed a different measure and the resolution did not survive the conference committee. *Id.* at 21. The use of U.S. forces in Libya in 1986 was short-lived, and though some bills were introduced amending the Act to deal with incidents of terrorism, none passed. *Id.* at 22. Although President Bush notified Congress of the 1989 invasion of Panama, Congress was out of session when the invasion occurred, and the invasion lasted only a few months. *Id.* at 25–26. The invasion of Panama was also very popular with the public and most of Congress. *Id.* at 26.

<sup>32</sup> United States v. Huet-Vaughn, 43 M.J. 105, 106–07 (C.A.A.F. 1995).

<sup>33</sup> *Id.* at 107.

<sup>34</sup> *Id.* at 109.

<sup>35</sup> *Id.* at 112.

irrelevant, because it pertained to a non-justiciable political question.”<sup>36</sup>

In the late 1960s and early 1970s, many litigants, civilian and military, challenged the legality of the Vietnam War; none was successful.<sup>37</sup> In most cases, the legality of war was considered a non-justiciable political question.<sup>38</sup> Those that addressed the legality of the war consistently found the President’s actions to be within the “zone of twilight” described by Justice Jackson in which the President is free to act provided he is not contravened by Congress.<sup>39</sup> Noting that Congress had passed the Gulf of Tonkin resolution, approved conscription, and appropriated funds, the courts held that Congress’s actions had sufficiently ratified the legality of the war.<sup>40</sup>

After the Vietnam War, the War Powers Act made this reasoning even more applicable. The existence of the Act allows courts to determine clearly whether Congress has endorsed, acquiesced in, or actively opposed a particular war. Failure to invoke the restrictive portions of the War Powers Act has been considered sufficient ratification to validate a President’s decision to commit military forces overseas. In 1982, following a suit by twenty-nine members of Congress, the Court of Appeals for the District of Columbia Circuit upheld a district court ruling that the determination of whether the President had violated the War Powers Act by sending troops to El Salvador was a political question.<sup>41</sup> In 1990, fearful that President George H.W. Bush would commit troops to war in Iraq without congressional authorization, fifty-four members of Congress sought an injunction preventing him from doing so.<sup>42</sup> Though finding the issue justiciable and that the representatives had standing to sue, the district court denied

the injunction because Congress as a whole had not taken action to oppose the President’s plan.<sup>43</sup>

### C. The Military Objectors’ Defense Given the Presumptive Legality of War

Under modern American law, it is almost impossible for any war to be considered unconstitutional or illegal.<sup>44</sup> Under American military law, all orders are presumptively legal.<sup>45</sup> Given the current state of the law as described above, absent a formal resolution from Congress explicitly declaring a particular military action to be unauthorized, all military actions endorsed, funded, or simply not opposed by Congress are presumptively valid under the Constitution, as are the orders to participate therein.<sup>46</sup> Both of the current wars in Iraq and Afghanistan were conducted pursuant to congressional authorization under the War Powers Act.<sup>47</sup> Congress has never taken action declaring either war unconstitutional or illegal and has continued to fund military operations in both theaters. Thus, under current law, both wars are evidently legal, at least as a matter of domestic law.<sup>48</sup>

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<sup>43</sup> *Id.* at 1150 (citing *Goldwater v. Carter*, 444 U.S. 996, 997–98 (1979)) (“If the Congress chooses not to confront the President, it is not our task to do so.”).

<sup>44</sup> There are many scholars of law and politics who argue that this should not be so. Particularly since 2001, concern has grown over the authority of the executive branch to use military force without any meaningful restraints provided by another branch of government or an international body. See, e.g., LOUIS FISHER, PRESIDENTIAL WAR POWER (2d ed. 2004) (arguing that, since the end of World War II, Presidents have repeatedly violated the Constitution by waging undeclared wars); MOSS, *supra* note 14 (noting that, in the face of compliant legislative and judicial branches, Presidents have been increasingly willing to make war more frequently and more unilaterally). *But see JOHN YOO*, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2005) (arguing that the constitutional framework is, and should be, flexible to allow for a variety of constitutionally acceptable methods for going to war). Despite the vigorous debate on the subject, these normative arguments remain, for the time being, academic. The current state of the law allows a President to initiate a war easily and legally.

<sup>45</sup> *See supra* text accompanying note 19.

<sup>46</sup> It is possible that even such a congressional resolution is not enough to hold military action invalid unless passed as legislation, with a presidential signature or veto override. *See supra* text accompanying note 29.

<sup>47</sup> The Authorization for Use of Military Force Against Iraq Resolution of 2002 is arguably the resolution that most faithfully adheres to the intent of the drafters of the War Powers Act. GRIMMET, *supra* note 31, at 58–59. Prior to ordering the invasion of Iraq, President Bush submitted a resolution to Congress. *Id.* at 56. This resolution was debated, amended, and passed as legislation before the invasion began. *Id.* at 56–57. Although, when signing the legislation President Bush echoed his father, saying that his “request for [the resolution] did not, and [his] signing the resolution does not constitute any change in the long-standing positions of the executive branch . . . on the constitutionality of the War Powers Resolution.” *Id.* at 57.

<sup>48</sup> In 2007 Congress passed legislation that linked funding for the Iraq war to a nonbinding “timetable” on troop withdrawals in Iraq. H. 1591, 110th Cong. § 1 (2007). President Bush vetoed the legislation, and after failing to override the veto Congress passed subsequent legislation that did not include such restrictions. H. 2206, 110th Cong. § 1 (2007). This appears to

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<sup>36</sup> *Id.* at 115 (citing *Flast v. Cohen*, 392 U.S. 83, 95 (1968); *Ange v. Bush*, 752 F. Supp. 509, 518 n.8 (D.D.C. 1990)).

<sup>37</sup> *See Holtzman v. Schlesinger*, 484 F.2d 1307, 1312 n.3 (2d Cir. 1973).

<sup>38</sup> E.g., *Luftig v. McNamara*, 373 F.2d 664 (D.C. Cir. 1967); *see generally Baker v. Carr*, 369 U.S. 186 (1962) (explaining the non-justiciability of “political questions”).

<sup>39</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (“[T]here is a zone of twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference, or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility”).

<sup>40</sup> E.g., *Orlando v. Laird*, 443 F.2d 1039, 1042 (2d Cir. 1971); *Massachusetts v. Laird*, 451 F.2d 26 (1st Cir. 1971). One such case was granted certiorari and affirmed by the Supreme Court. *Atlee v. Laird*, 411 U.S. 911 (1973) (Elliot Richardson succeeded Melvin Laird as Secretary of Defense at the start of President Nixon’s second term).

<sup>41</sup> *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983).

<sup>42</sup> *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990).

The presumptive legality of wars makes the defenses of military objectors difficult to support. The prosecution can generally prove every necessary element of the *prima facie* offense, regardless of the particular charge an objector faces—including desertion, missing movement, or failure to obey an order.<sup>49</sup> In each of these cases, the soldier is under orders to report to a specific location at a specific time, normally to deploy to a combat theater, and the soldier purposely or knowingly fails to do so, which completes the crime. The soldier's defense, therefore, relies on a finding that the order was illegal. However, as discussed above, the legality of orders is not a discrete element of the offenses relevant to military objectors that must be proven by the Government; rather, the legality of orders is a matter of law to be determined by the judge before trial.<sup>50</sup>

Furthermore, mistake of law is not a defense under military law.<sup>51</sup> Presumably, a soldier who disobeys an order believing it to be illegal would have no defense if the order is determined to be legal.<sup>52</sup> The military objector's defense requires a finding that the war is illegal; a reasonable yet erroneous belief in the illegality of the war would not sustain the defense. The precedents on which military judges can draw uniformly indicate that the legality of war is a non-justiciable question, at least unless Congress has acted to oppose the particular military operation, and therefore an order to deploy to war is always a legal order.<sup>53</sup> Therefore,

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indicate an awareness of Congress that a congressional resolution alone would be legally insufficient to end the war. *See supra* note 46 and accompanying text.

<sup>49</sup> See UCMJ arts. 85, 87, 92 (2008). For example, 1LT Watada was charged with a violation of Article 87 (missing movement), and he stipulated in a pretrial agreement that he was under orders to board an airplane which he did not board. This stipulation essentially admitted all factual elements of the offense. *Watada v. Head*, 2008, No. C07-5549BHS, U.S. Dist. Lexis 88489 at \*5, 9–10 (W.D.Wa. 2008). (The military judge later found that 1LT Watada did not fully understand the significance of his admission, leading to a mistrial). *Watada*, 2008 U.S. Dist. Lexis 88489, at \*15.

<sup>50</sup> *See supra* note 21 and accompanying text. At 1LT Watada's court martial, the military judge made the preliminary decision that the order was legal, and prevented the defense from introducing evidence challenging the validity of the Iraq War. *Watada*, 2008 U.S. Dist. Lexis 88489, at \*9. This was correct under military law, but some in the American anti-war movement saw this as a deliberate measure by the U.S. Army to avoid publicly admitting or confronting the illegality of the war. Brecher & Smith, *supra* note 9. First Lieutenant Watada attempted to raise this defense as a mistake of fact related to *mens rea*, but the military judge, recognizing it as an issue of law, did not allow this defense to be raised. *Watada*, 2008 U.S. Dist. Lexis 88489, at \*8–9.

<sup>51</sup> MCM, *supra* note 19, R.C.M. 916(l)(1).

<sup>52</sup> See FM 6-22, *supra* note 10, ¶ 4-75 (“There is a risk when a leader disobeys what may be an illegal order . . . ”).

<sup>53</sup> An order to deploy to war that Congress has opposed may constitute an illegal order, assuming such congressional opposition is sustained. *See supra* note 46 and accompanying text. As a practical matter, however, a war opposed by Congress would not be funded, and thus brought to a very swift conclusion. Soldiers would not continue to deploy (and be ordered to deploy) in such a scenario.

having committed a crime under the UCMJ, the military objector is left with no defense.

### III. Responsibility for Wars Under International Law

At his administrative separation hearing,<sup>54</sup> Sergeant Chiroux claims to have quoted from the Constitution of the United States, specifically Article VI, which states that treaties entered into under the authority of the United States are part of the “supreme law of the land” and that, because the Iraq War was a violation of the U.N. Charter, it was therefore illegal under both domestic and international law.<sup>55</sup> At first glance, this argument appears stronger than any based solely in domestic law. Compared with the presumption of legality under domestic law, very narrow conditions determine which wars are legal under international law.

The Nuremberg trials established the precedent that individuals can be punished for “Crimes Against Peace,” defined as the “planning, preparation, and waging of wars of aggression,”<sup>56</sup> as well as the well-known principle that “superior orders” (i.e., that following the orders of a superior, even if illegal) is not a defense.<sup>57</sup> The U.S. Army’s Field Manual (FM), *Law of Land Warfare*, alluded to by 1LT Watada,<sup>58</sup> recognizes that “crimes against peace” are punishable violations of international law.<sup>59</sup> It further acknowledges that superior orders is not a defense against a violation of the law of war and that an act may violate international law even if it is not illegal under domestic law.<sup>60</sup> Thus, an order to participate in a war that is legal under domestic law may be illegal if the war is illegal under international law. This leaves a possible opening for the

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<sup>54</sup> An administrative separation hearing is sometimes convened to determine the character of a Soldier's discharge, normally when issues of conduct are involved. *See generally* U.S. DEP'T OF ARMY, REG. 135-178, ENLISTED ADMINISTRATIVE SEPARATIONS (13 Mar. 2007). This was the regulation that was in effect, as Chiroux was a sergeant in the individual ready reserve at the time of his hearing. Matthis Chiroux, Confessions of a War Resister (Apr. 23, 2009), <http://matthisresists.us> (“I faced the military for my refusal to deploy to Iraq, and I walked away a free man with a general Discharge from the Army’s Individual Ready Reserve.”).

<sup>55</sup> Chiroux, *supra* note 54 (citing U.S. CONST. art. VI, §2).

<sup>56</sup> *See* 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 11 (1947), available at [http://www.loc.gov/frd/Military\\_Law/NT\\_major-war-criminals.html](http://www.loc.gov/frd/Military_Law/NT_major-war-criminals.html) [hereinafter IMT]. Article 6, Charter of the IMT established individual culpability for Crimes “Against Peace.” Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279

<sup>57</sup> Charter of the International Military Tribunal art. 8, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 (“The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determine that justice so requires.”).

<sup>58</sup> *See supra* text accompanying note 4.

<sup>59</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE ch. 8, ¶ 498 (18 July 1956) (C1, 15 July 1976) [hereinafter FM 27-10].

<sup>60</sup> *Id.* ch. 8, ¶¶ 509, 511.

military objectors' defense that they had justifiably refused to participate in illegal activities.

Since the inception of modern international law, the responsibility of military personnel has been confined to the realm of *jus in bello*—governing conduct in war. Under international law, military personnel generally do not bear responsibility for *jus ad bellum*—the legality of war itself. United States military law acknowledges that, while “crimes against peace” and “crimes against humanity” are violations of international law, “members of the armed forces will normally be concerned, only with those offenses constituting ‘war crimes.’”<sup>61</sup> Military objectors often conflate these principles, claiming that because war crimes occur, the war itself is morally objectionable and illegal. But there is a distinct legal difference. Though a soldier can be punished for participation in war crimes (e.g., pillage or purposeless destruction, killing prisoners or other “protected persons,” firing on undefended localities),<sup>62</sup> since Nuremberg, military personnel below a certain rank cannot be held responsible for the legality of war.<sup>63</sup> Even if a war is illegal, under international law military objectors, typically of enlisted or junior officer rank, cannot be held criminally liable for “crimes against peace,” which makes it doubtful that they can legally refuse an order to participate in the war. This is essentially an issue of standing and blends international and domestic law. If a soldier cannot be punished under international law for the consequences of following the order, he cannot claim that by participating in the war he would be committing an illegal act, or that the order to deploy was an illegal order.

#### A. The Legality of War Under International Law

The second article of the U.N. Charter requires that members refrain “from threat or use of force against the territorial integrity or political independence of any state.”<sup>64</sup> The General Assembly has declared that “a war of aggression constitutes a crime against peace, for which there is responsibility under international law,”<sup>65</sup> and defined aggression as an illegal use of force, invasion, or attack.<sup>66</sup> Though classifying a war as illegal under U.S. domestic law

<sup>61</sup> *Id.* ¶ 498.

<sup>62</sup> *Id.* ¶¶ 503, 504.

<sup>63</sup> XI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL ORDER NO. 10, at 486 (1949), available at [http://www.loc.gov/rr/frd/Military\\_Law/NTs\\_war-criminals.html](http://www.loc.gov/rr/frd/Military_Law/NTs_war-criminals.html) [hereinafter NMT] (The title uses the contemporary spelling of Nuremberg) (“Somewhere between the dictator and supreme commander of the military forces of the nation and the common soldier is the boundary between the criminal and the excusable participation in the waging of an aggressive war by an individual engaged in it.”).

<sup>64</sup> U.N. Charter art. 2

<sup>65</sup> G.A. Res. 2625 (XXV), U.N. Doc. A/RES/2625 (Oct. 24, 1970).

<sup>66</sup> G.A. Res. 3314 (XXIX), U.N. Doc. A/RES/3314 (Dec. 14, 1974).

is difficult, an illegal war can readily be envisioned under international law. Under the U.N. Charter, only two instances permit the use of military force against another state: self-defense<sup>67</sup> or when approved by the Security Council.<sup>68</sup> Absent one of these two conditions, all military invasions or attacks by parties to the Charter against another are illegal under international law.

Prior to the invasion of Iraq in 2003, the U.S. Government recognized both of these conditions. The 2002 Authorization for the Use of Military Force Against Iraq includes references to enforcement of U.N. Security Council resolutions and invokes the right to national self-defense.<sup>69</sup> However, U.N. Security Council Resolution 1441, which found Iraq in violation of previous resolutions, used the ambiguous phrase “serious consequences”; in comparison, U.N. Security Council Resolution 678, which authorized the 1991 war against Iraq to liberate Kuwait, used the phrase “all necessary means,” which has normally been interpreted as justifying military force.<sup>70</sup>

In addition to the uncertainty over the level of force authorized by the Security Council resolutions, President Bush controversially defined self-defense to include “preemptive” self-defense.<sup>71</sup> Furthermore, then-U.N. Secretary General Kofi Annan declared the invasion of Iraq illegal.<sup>72</sup> Given that wars are presumptively illegal under international law, absent the two circumstances described above, the invasion of Iraq was questionably legal at best and plausibly illegal.<sup>73</sup> Nonetheless, within months, the Security Council passed a resolution that declared the United States and the United Kingdom as “occupying powers” and conferred legitimacy on the occupation.<sup>74</sup> Although the

<sup>67</sup> U.N. Charter art. 51 (recognizing that the right of individual and collective self-defense is “inherent”).

<sup>68</sup> *See id.* arts. 34, 35, 41, 42, 43.

<sup>69</sup> *See* Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498.

<sup>70</sup> Compare S.C. Res 1441, U.N. Doc. S/RES/1441 (Nov. 8, 2002), with S.C. Res 678, U.N. Doc. S/RES/678 (Nov. 29, 1990).

<sup>71</sup> NATIONAL SECURITY STRATEGY OF THE UNITED STATES 6 (2002), available at <http://merlin.ndu.edu/whitepapers/USnss2002.pdf>.

<sup>72</sup> *Iraq War Illegal, Says Annan*, BBC NEWS, Sept. 16, 2004, available at [http://news.bbc.co.uk/2/hi/middle\\_east/3661134.stm](http://news.bbc.co.uk/2/hi/middle_east/3661134.stm).

<sup>73</sup> Given that the United States has veto authority in the Security Council, does not submit to the compulsory jurisdiction of the International Court of Justice, and does not consider itself a signatory to the Rome Statute of the International Criminal Court, there is likely no international body that could have authoritatively ruled that the 2003 invasion of Iraq was illegal and imposed punishment on the United States or U.S. personnel who participated in it.

<sup>74</sup> The resolution was extended several times until an agreement akin to a Status of Forces Agreement was executed between the United States and the newly sovereign government of Iraq. *See* S.C. Res. 1483, U.N. Doc S/RES/1483 (May 22, 2003); S.C. Res. 1546 U.N. Doc. S/RES/1546 (June 8, 2004); S.C. Res. 1637 U.N. Doc. S/RES/1637 (Nov. 11, 2005); S.C. Res. 1723 U.N. Doc. S/RES/1723 (Nov. 28, 2006); S.C. Res. 1790 U.N. Doc. S/RES/1790 (Dec. 18, 2007); *see also* Agreement Between the United

resolution pointedly did not confer legality on the invasion ex post facto, from that point on, military operations in Iraq have been sanctioned by the U.N. and are presumably legitimate under international and domestic law. As discussed below, regardless of whether military operations begin, become, or remain illegal under international law, the legality of the war is irrelevant to the defense of military objectors.

## B. The Nuremberg Precedents

The trials of German war criminals at Nuremberg established many precedents. Perhaps the most well-known is the principle that superior orders is not a justification for violating international law.<sup>75</sup> The trials also established that individual government officials can be held responsible for their nations’ “wars of aggression” waged in violation of international law.<sup>76</sup> The tribunals’ decisions reflect a careful acknowledgement that military officers are expected to obey orders and that their responsibility and capacity for questioning the legality of orders is limited.

The first trial was the Trial of the Major War Criminals before the International Military Tribunal (IMT); this was the only trial conducted by an international tribunal.<sup>77</sup> The defendants included many high-ranking members of the Nazi Party, civilian government leaders, and top military officers.<sup>78</sup> The military officers were Field Marshal Wilhelm Keitel, Chief of the High Command of the Armed Forces; Colonel-General Alfred Jodl, Chief of Staff of the Armed Forces (Oberkommando der Wehrmacht or OKW); and Admiral Erich Raeder, Commander of the Navy (Kriegsmarine).<sup>79</sup> Because the military high command was intertwined with the political leadership of the Nazi regime, some of the defendants held military positions as well as political office. For instance, Herman Göring was the commander-in-chief of the Air Force (Luftwaffe), as well as the supreme leader of the Nazi Sturmabteilung (SA) and second in command to Hitler, and Karl Dönitz was the commander-in-chief of the Kriegsmarine and became the “head of the German Government” following Hitler’s death.<sup>80</sup> Additionally, many of the civilian defendants at the IMT held the equivalent rank of general in the Schutzstaffel

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States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, U.S.-Iraq, Nov. 17, 2008, available at [http://www.mnf-iraq.com/images/CGs\\_Messages/security\\_agreement.pdf](http://www.mnf-iraq.com/images/CGs_Messages/security_agreement.pdf).

<sup>75</sup> See *supra* note 57 and accompanying text.

<sup>76</sup> 1 IMT, *supra* note 56, at 11.

<sup>77</sup> *Id.*, at 10.

<sup>78</sup> *Id.* at 68–79.

<sup>79</sup> *Id.* at 77–78. Raeder was also a member of the Secret Cabinet Council. *Id.* at 78.

<sup>80</sup> *Id.* at 68–79.

(SS)<sup>81</sup> but were not military officers in the legal or professional sense.

The IMT indicted each defendant separately for some combination of four charges: participation in a conspiracy to commit crimes against peace, crimes against peace by waging aggressive war, war crimes, and crimes against humanity.<sup>82</sup> Field Marshal Keitel and Colonel-General Jodl were each indicted on all four counts.<sup>83</sup> In support of these indictments, the prosecution alleged that Keitel, in addition to having an “intimate connection” with Hitler, “participated in the political planning and preparation . . . for Wars of Aggression and Wars in Violation of International Treaties, Agreements, and Assurances,” and was responsible for the execution of the military plan.<sup>84</sup> Jodl’s indictment alleged he was responsible for “the military planning” of such wars.<sup>85</sup> Likewise, Raeder allegedly promoted the “political planning and preparation” for wars and “executed and assumed responsibility” for the military plan.<sup>86</sup>

The tribunal convicted Keitel and Jodl on all counts and convicted Raeder on counts one, two, and three—he was not indicted on count four, crimes against humanity.<sup>87</sup> In support of the conviction, the tribunal noted that Jodl bore responsibility for planning the invasion of Czechoslovakia in 1938, including the plan to trigger the invasion with a manufactured “incident” to “give Germany provocation for military intervention.”<sup>88</sup> The tribunal also found that Keitel and Jodl were involved in the plan to overthrow the Government of Norway.<sup>89</sup> The tribunal found Raeder responsible for the buildup of the German Navy in violation of the Versailles Treaty and for first suggesting the invasion of Norway.<sup>90</sup> All these defendants bore responsibility for both political as well as military decisions, orders, and acts in violation of international laws, and their convictions for conspiracy and crimes against peace rested on political as well as military grounds.

The United States conducted twelve additional trials of lower-ranking individuals, known formally as the Trials of War Criminals before the Nuremberg Military Tribunal (NMT).<sup>91</sup> These trials were all prosecuted by Brigadier

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 28–29.

<sup>83</sup> *Id.* at 77–78.

<sup>84</sup> *Id.* at 77.

<sup>85</sup> *Id.* at 77–78.

<sup>86</sup> *Id.* at 78.

<sup>87</sup> *Id.* at 291 (Keitel), 325 (Jodl), 317 (Raeder).

<sup>88</sup> *Id.* at 196.

<sup>89</sup> *Id.* at 205.

<sup>90</sup> *Id.* at 315.

<sup>91</sup> NMT, *supra* note 63

General (BG) Tedford Taylor.<sup>92</sup> In four of the twelve trials, BG Taylor charged the defendants with “war making” or “crimes against peace,” using language similar to the indictments of the IMT.<sup>93</sup> Defendants were civilians at three of the four trials, namely the “Krupp Case,” (Trial No. 10)<sup>94</sup> the “Farben Case” (Trial No. 6),<sup>95</sup> and the “Ministries Case” (Trial No. 11).<sup>96</sup>

The only trial at which military officers—distinct from officers of the SS, who held military-equivalent ranks—were tried was the “High Command Case” (Trial No. 12).<sup>97</sup> The fourteen defendants included seven Army, Naval, and Air Group commanders; four Army Commanders; two staff officers; and the Judge Advocate General of the OKW.<sup>98</sup> At this trial, count one of the indictment was for crimes against peace, namely “participating in wars and invasions aggressive in character and violative of international treaties, agreements, and assurances.”<sup>99</sup> Count four was for participation in a conspiracy to commit crimes against peace.<sup>100</sup> At the trial, the OKW Judge Advocate General, Rudolf Lehmann, speaking for all defendants, informed the tribunal that under the Weimar Constitution the legality of orders was not reviewable by a court.<sup>101</sup> The tribunal first struck the conspiracy count from the indictment because the prosecution had not introduced evidence supporting a conspiracy separate from, and in addition to, evidence in support of other counts, and because any defendant who could be convicted of conspiracy could also be convicted of a principal offense.<sup>102</sup> The tribunal then acquitted all fourteen defendants of count one (crimes against peace) en masse.<sup>103</sup> In doing so, the tribunal stated:

If . . . a defendant came into possession of knowledge that the invasion and wars to be waged, were aggressive and lawful, then he will be criminally responsible if he, being on the policy level, could have influenced such policy and failed to do so.<sup>104</sup>

The tribunal found that while all the defendants were generals, admirals, or field marshals, they were nonetheless below the “policy level” and could not have influenced the decision to wage war.<sup>105</sup> The tribunal stated that while it would have been “eminently desirable” for the defendants to have disobeyed orders, it also recognized the “obligations which individuals owe to their states” and observed that international law did not require military personnel to refuse to participate in aggressive wars.<sup>106</sup>

### C. The Distinction Between *Jus ad Bellum* and *Jus in Bello*

The discussion above deals primarily with the responsibility for the political decision to engage in warfare rather than the conduct of soldiers in war. Throughout history, nations and armies have evolved a “set of articulated norms, customs, professional codes, legal precepts, religious and philosophical principles, and reciprocal arrangements” to govern the conduct of soldiers and states engaged in warfare.<sup>107</sup> Since medieval times, two different moral standards have been applied to war: *jus ad bellum* and *jus in bello*.<sup>108</sup> The “crime of war,” including aggressive, unprovoked attack by one state upon another, is distinct from “war crimes,” which are violations of the legal and moral principles and norms governing soldiers in war.<sup>109</sup> These two standards are separate; “it is perfectly possible for a just war to be fought unjustly and for an unjust war to be fought in strict accordance with the rules.”<sup>110</sup> For example, although Field Marshal Erwin Rommel fought for Hitler, he has been repeatedly described as “an honorable man” who was not involved in the Nazis’s dishonorable activities and who refused to follow Hitler’s order to kill enemy soldiers caught behind the lines or to shoot prisoners.<sup>111</sup> This dichotomy illustrates

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<sup>92</sup> BRIGADIER GENERAL TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON NUERNBERG WAR CRIMES TRIALS CONTROL COUNCIL ORDER NO. 10 (1949) (using the contemporary spelling of Nuremberg).

<sup>93</sup> *Id.* at 67.

<sup>94</sup> United States v. Alfried Felix Alwyn Krupp, IX NMT, *supra* note 63, at 7–9. Defendants were agents and officials of Fried Krupp Essen, a corporation. Some also had ties to the SS. *Id.*

<sup>95</sup> United States v. Carl Krauch, VII NMT, *supra* note 63, at 11–14. Defendants were agents and officials of I.G. Furberindustrie Abtigesellschaft. Some were SS officers. *Id.*

<sup>96</sup> United States v. Ernst von Weizsaecker, XII NMT, *supra* note 63, at 1. Defendants were various government and Nazi party officials. Some also had ties to the SS. *Id.*

<sup>97</sup> United States v. Wilhelm von Leeb, X NMT, *supra* note 63, at 11.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 3.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 433.

<sup>102</sup> *Id.* at 483.

<sup>103</sup> *Id.* at 490.

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<sup>104</sup> XI NMT, *supra* note 63, at 488–89.

<sup>105</sup> *Id.* at 489.

<sup>106</sup> *Id.*

<sup>107</sup> MICHAEL WALZER, JUST AND UNJUST WARS 44 (4th ed. 2006). Walzer labels this “set of articulated norms,” etc. “The War Convention.” *Id.*

<sup>108</sup> *Id.* at 21.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 38.

the distinction between *jus ad bellum* and *jus in bello*. We draw a line between the war itself, for which soldiers are not responsible, and the conduct of the war, for which they are responsible, at least within their own sphere of activity. Generals may well straddle the line, but that only suggests that we know pretty well where it should be drawn . . . . Rommel was a servant, not a ruler, of the German state . . . . By and large we don't blame a soldier, even a general, who fights for his own government.<sup>112</sup>

Military law recognizes the distinction. The CAAF has stated that “[t]he so-called ‘Nuremberg defense’ applies only to individual acts committed in wartime; it does not apply to the Government’s decision to wage war.”<sup>113</sup> Immunizing soldiers from responsibility for *jus ad bellum* is crucial to maintaining military order and discipline, and also to ensuring that soldiers are not punished, either by their own nation or other nations, for political decisions. The International Committee of the Red Cross (ICRC) refutes the military objectors’ belief that participating in an illegal war makes soldiers war criminals. The ICRC maintains that the distinction is necessary to ensure soldiers and civilian citizens of a state receive the protections of international humanitarian law, including protections against reprisals for the actions of their governments, even if their state is engaged in an unjust war.<sup>114</sup>

After Nuremberg, one of the most oft-cited examples of the failure of the defense of superior orders is the trial of 1LT William Calley.<sup>115</sup> First Lieutenant Calley was convicted of murdering several unarmed civilians in the Vietnamese village of My Lai in March, 1968.<sup>116</sup> While admitting to his participation in the killings,<sup>117</sup> Calley claimed alternately that the civilians were legitimate combatants not entitled to protection under international law and that his acts were justified because he was following orders.<sup>118</sup> Testimony at trial differed as to whether Calley’s commanding officer had issued orders to kill civilians.<sup>119</sup> The court held that this made no difference. The trial judge instructed the court members that such an order, if it was

given, was illegal as a matter of law; that it was such that “a man of ordinary sense” would have known it to be illegal; and that obedience to such an order was no defense.<sup>120</sup> *Calley* is well-known for confirming and clarifying the duty of military personnel to disobey illegal orders and the concept, established at Nuremberg, that obedience to orders is not always a defense. But *Calley* is distinguishable from the Nuremberg trials in that it solely involves *jus in bello*; 1LT Calley was punished for specific actions during wartime for which he was personally responsible. *Jus ad bellum* was never an issue.

#### D. Collective Responsibility for War Crimes

Conflating *jus ad bellum* and *jus in bello*, many contemporary military objectors allege that war crimes have occurred in Iraq and by participating in the war they would become complicit in their commission.<sup>121</sup> Some claim to have witnessed criminal acts during previous deployments.<sup>122</sup> Others, like 1LT Watada, never deployed yet claimed to have become aware of war crimes from the accounts of others.<sup>123</sup> In addition to their objections to the war itself, military objectors may also attempt to incorporate into their defenses the assumption that they would bear legal responsibility for crimes committed by others during the war, even if they did not participate themselves.

Their interpretation of the law is correct insofar as soldiers can be punished for committing war crimes,<sup>124</sup> and

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<sup>120</sup> *Id.* at 1183.

<sup>121</sup> See 1LT Watada’s claim that by deploying to Iraq he would become a “party to war crimes.” *See supra* text accompanying note 4. See also Hinzman’s claim that he would be “a criminal.” *See supra* text accompanying note 8.

<sup>122</sup> See Peter Laufer, *You Wouldn’t Catch Me Dead in Iraq*, SUNDAY TIMES (London), Aug. 27, 2006, available at [http://www.timesonline.co.uk/tol/life\\_and\\_style/article612898.ece?token=null&offset=0&page=1](http://www.timesonline.co.uk/tol/life_and_style/article612898.ece?token=null&offset=0&page=1). Darrel Anderson says he was ordered to fire on a family of civilians. *Id.* Joshua Key claims to have arrived at the scene of a massacre of civilians where Soldiers were “kicking the heads around.” *Id.* Ivan Brobeck says he witnessed abuse of detainees and prisoners. *Id.* All three are former Soldiers who deserted and sought refuge in Canada. *Id.*

<sup>123</sup> *Id.* Ryan Johnson, another former Soldier, deserted and fled to Canada to avoid deploying to Iraq. *Id.* He said “we’re blowing up museums, people’s homes, all the culture [sic].” *Id.*

<sup>124</sup> FM 27-10, *supra* note 59, ¶ 507(b).

The United States normally punishes war crimes as such only if they are committed by enemy nationals or by persons serving the interests of the enemy State. Violations of the law of war committed by persons subject to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice and, if so, will be prosecuted under that Code. . . . Commanding officers of United States troops must insure [sic] that war crimes committed by members of their forces against enemy personnel are promptly and adequately punished.

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<sup>112</sup> *Id.* at 38–39.

<sup>113</sup> United States v. Huet-Vaughn, 43 M.J. 105, 114 (C.A.A.F. 1995).

<sup>114</sup> *What Are Jus ad Bellum and Jus in Bello?* INTERNATIONAL HUMANITARIAN LAW: ANSWERS TO YOUR QUESTIONS (International Committee of the Red Cross), Jan. 1, 2004, available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/5KZJJD>.

<sup>115</sup> United States v. Calley, 46 C.M.R. 1131 (A.C.M.R. 1973).

<sup>116</sup> *Id.* at 1168–173.

<sup>117</sup> *Id.* at 1173.

<sup>118</sup> *Id.* at 1174.

<sup>119</sup> *Id.* at 1182.

military law makes it a crime to “aid[], abet[], counsel[], command[], or procure[] [the commission of a crime].”<sup>125</sup> But the military objectors’ argument requires an unsustainable extrapolation of the law. Under their proposed interpretation, every soldier in a theater of operations would be culpable for the criminal actions of every other soldier in the theater. This is not a correct interpretation of the law.<sup>126</sup> Under the UCMJ, to be guilty of a crime committed by another person, one must “share in the criminal purpose of the design.”<sup>127</sup> Though physical presence at the scene of a crime is not required,<sup>128</sup> the shared purpose requirement is sufficient to define the scope of and participation in a criminal enterprise. Absent shared intent, individuals cannot be liable for the criminal acts of others.

In addition to aiding and abetting, individual defendants can be tried and punished for the crimes of others if they participate in a criminal conspiracy.<sup>129</sup> Military law allows for participants in a conspiracy to be found liable for all offenses committed pursuant to the conspiracy,<sup>130</sup> but conspiracy requires shared intent.<sup>131</sup> So again, even if a conspiracy to commit war crimes existed, an individual must have had the intent that such crimes occur to be culpable for the commission of war crimes in furtherance of the conspiracy.

It would be legally dubious and logistically impractical to individually charge and prosecute all soldiers in a theater of operations for war crimes committed by a few. However, some military objectors rely on the assumption that they could be held responsible for violations of international law for mere participation in the military operation. As

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*Id.* As an example, though his actions likely could have been considered “war crimes” under international law, 1LT Calley was tried and convicted of murder under UMCJ Article 118. *Calley*, 46 C.M.R. at 1138.

<sup>125</sup> UCMJ art. 77 (2008). Military law, like most modern jurisdictions, does not distinguish between “accessories” (other than accessories after the fact, Article 78) and “principals”; those who aid and abet are tried and punished as principals. *Id.* art. 77 (“Any person punishable under [the UCMJ] who commits an offense punishable by [the UCMJ], or aids, abets, counsels, commands, or procures its commission . . . is a principal”).

<sup>126</sup> In dismissing her appeal, the CAAF noted that CPT Huet-Vaughn had “tendered no evidence that she was individually ordered to commit a ‘positive act’ that would be a war crime.” *United States v. Huet-Vaughn*, 43 M.J. 105, 114 (C.A.A.F. 1995).

<sup>127</sup> MCM, *supra* note 19, pt. IV, ¶ 1 (b)(2)(b); *see also* *United States v. Jacobs*, 2 C.M.R. 115, 117 (C.M.A. 1952) (“The proof must show that the aider or abettor . . . participated in it as in something he wished to bring about, that he sought by his action to make it successful.”).

<sup>128</sup> *Id.* pt. IV, ¶ 1 (b)(3)(a).

<sup>129</sup> *Id.* pt. IV, ¶ 5 (c)(5).

<sup>130</sup> *Id.* *See generally* *Pinkerton v. United States*, 328 U.S. 640 (1946) (finding that acts committed by one person in furtherance of a conspiracy can be attributed to all conspirators).

<sup>131</sup> *See United States v. LaBossiere*, 32 C.M.R. 337 (C.M.A. 1962) (holding that a conspiracy in military law requires “meeting of minds”); *see also* *United States v. Valigura*, 54 M.J. 187, 190 (C.A.A.F. 2000) (rejecting the Model Penal Code’s concept of a unilateral conspiracy).

discussed, under international law, military personnel cannot be held responsible for the legality of war itself, and, assuming they do not intend for war crimes to occur or work to further their commission, they cannot be held responsible for illegal acts that take place during the course of the war. Therefore, military objectors’ belief that they would become war criminals simply by deploying to a combat theater is unsupportable.

Furthermore, the argument that committing one crime (the disobedience of an order) to avoid committing another crime (participation in an illegal war under international law) is a red herring. If a soldier cannot be held liable for participation in a war, illegal or otherwise, then disobedience of an order to avoid the legal repercussions of participating in the war cannot be justified.<sup>132</sup> An order to participate in war cannot be an illegal order, and military objectors cannot justify refusing to follow such an order.

### III. Significance

Any sustained or controversial military conflict will inevitably give rise to some public opposition movement. This opposition may be minuscule and insignificant, or it may become a socially and politically significant phenomenon. The longer, more dangerous, and more controversial the conflict becomes, the more likely servicemembers within the ranks will refuse to fight. Some will defend or justify their conduct by claiming it is their professional responsibility to oppose an illegal war—but the law does not support this interpretation. The legality of war is not the professional responsibility of soldiers; soldiers do not have a right or an obligation to refuse to participate in a war.

As discussed, soldiers below a certain rank have no responsibility for *jus ad bellum*, yet paradoxically, soldiers at the “policy level” who may have such responsibility frequently can avoid personal responsibility for the decision to go to war. A general who feels he cannot in good faith execute the orders given by his superiors, including the President or the Secretary of Defense, has the ability to retire or “resign under protest.”<sup>133</sup> But an enlisted soldier who is under a contract of enlistment, a junior officer who has not

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<sup>132</sup> *See supra* note 63 and accompanying text.

<sup>133</sup> The obligation of a senior officer to resign if he cannot faithfully execute the orders of his civilian superiors is the subject of a great deal of scholarship and debate in military law and civil-military relations. *See, e.g.*, Leonard Wong & Douglas Lovelace, *Knowing When to Salute*, 52 ORBIS 278 (2008) (citing many authorities on the subject and arguing that there are additional measures available to officers, short of resignation); Richard Swain, *Reflection on an Ethic of Officership*, 37 PARAMETERS NO. 1, at 4 (Spring 2007) (giving a history of the actions taken by officers who disagreed with their superiors); *but see* Richard B. Myers & Richard H. Kohn, *Salute and Disobey? The Civil-Military Balance, Before Iraq and After*, FOREIGN AFF., Sept.-Oct. 2007, at 147 (arguing that resignation is never an appropriate course of action).

completed his service obligation, or a field grade officer whose resignation offer is denied, cannot leave the military service, even though his belief in the injustice of an impending or ongoing war is just as fervent as those of the general. These soldiers are left in a difficult moral dilemma. They are forced to choose between participation in a war they believe is illegal and the threat of punitive action.

This has profound legal and ethical implications. Although military law and doctrine emphasize individual responsibility and the duty to disobey blatantly illegal orders, there is no such duty (or even a right) to disobey an order to participate in war. Although many military objectors may be ultimately motivated by political ideology or a desire to avoid the danger of combat, even military objectors whose professed beliefs are genuine have no available recourse. This is the law as it currently exists, and it is necessary for the preservation of military discipline and national security.

There are those who believe that all soldiers bear individual responsibility for the wars in which they fight;<sup>134</sup> however, exposing soldiers to moral and legal responsibility for the decision to wage war would create the potential for serious harm to military discipline. If soldiers are expected to shoulder such responsibility, it follows that they must also be given the opportunity to refuse it. This would create a situation where every soldier is obligated to question every order and is free to disobey orders that run counter to his personal views on their legality or morality. This runs

contrary to the expectation that all orders are to be obeyed.<sup>135</sup> In the military, disobeying orders, desertion, and other violations of the UCMJ are not laudable forms of civil disobedience; they amount to an unacceptable degradation of good order and discipline. For the sake of national security, the military and individual members thereof cannot be allowed to decide which wars to fight. The reasons for and decision to wage war are the responsibility entrusted by the American people to the civilian political leadership, to whom the military must be loyally subordinate.<sup>136</sup> Exempt from bearing responsibility for the decision to go to war, soldiers are expected to obey the orders of their civilian leaders when that decision is made.

Those soldiers who feel they cannot, in good conscience, fight a war—yet cannot leave military service—are admittedly faced with a difficult choice: fight the war they feel is wrong or be punished. This has the potential to result in punishment of otherwise honorable and loyal individuals. Allowing any alternative, however, would create the potential for a massive breakdown of military discipline and a serious crisis of national security. In order to preserve the relationship between the military and civilian authority and to maintain military discipline, the law holds that belief in the illegality of war is no defense for a soldier who refuses to fight.

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<sup>134</sup> E.g., J. Joseph Miller, *Jus ad Bellum and an Officer's Moral Obligations: Invincible Ignorance, the Constitution, and Iraq*, 30 SOC. THEORY & PRAC. 457 (2004). After addressing many of the same legal and philosophical principles discussed above and in Michael Walzer's *Just and Unjust Wars*, Miller concludes that "every officer who participated in the 2003 Gulf War is guilty of having violated his or her Oath to defend the Constitution and is accordingly morally accountable for the violation." *Id.* at 484. Miller also adds, in a footnote, that "it is not at all obvious to me that punishing officers [by criminal prosecution] for their participation in an unjust war . . . is sufficiently weighty to require that the nation jeopardize one of its most fundamental purposes, namely, that of defending its citizens." *Id.* With this, he appears to acknowledge that holding officers responsible for unjust wars would be detrimental to national security.

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<sup>135</sup> As noted, military law recognizes that Soldiers are not expected to analyze the legal and ethical implications of all orders; rather they are expected to obey all orders except those that are obviously illegal to a "person of ordinary sense and understanding." See MCM, *supra* note 19, R.C.M. 916(d) and accompanying text.

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<sup>136</sup> U.S. CONST art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States"); *see also* 10 U.S.C. § 113, 50 U.S.C. § 401 (2006) (vesting control over the military in the Secretary of Defense, a civilian official subordinate to the President).